IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No.422 of 2006

Decided on : November 15, 2006

Prabhu Ram **…..Appellant.**

VERSUS

Jagdish Ram and another **…..Respondents.**

Coram

The Hon'ble Mr. Justice Surjit Singh, Judge.

Whether approved for reporting?

For the Appellant : Mr. Rajiv Jiwan, Advocate.

For the Respondents : Mr. Ashwani Sharma, Advocate.

Surjit Singh, Judge (Oral)

Heard and gone through the record.

2. Appellant-plaintiff filed a suit for declaration that he was owner to the extent of half share in the estate of late Smt. Shanti, on the strength of a Will executed by said Shanti in the year 1962 in his and his brother Nathu's (impleaded as proforma respondent No.2) favour. By way of consequential relief, permanent prohibitory injunction restraining defendant-respondent No.1 Jagdish Ram from interfering in his joint possession was also sought.

3. It was alleged in the plaint that Smt. Shanti, in the year 1962, had executed a Will in his and his brother Nathu's (proforma respondent No.2) favour and by that Will she had bequeathed her estate, in equal shares, in favour of the two brothers, plaintiff and proforma respondent No.2. It was further alleged that after the death of said Shanti in the year 1994, defendant-respondent No.1

Whether the reporters of the local papers may be allowed to see the Judgment?

had set up a Will, allegedly executed in the year 1986, in his favour, by said Shanti. The Will was alleged to be bogus and forged.

4. Defendant-respondent No.1 contested the suit. Though he admitted the Will of 1962, yet pleaded that the said Will stood superseded by the Will executed and got registered on 28.11.1979, per which the testatrix had bequeathed her entire estate in favour of his father Nathu Ram and that that Will of 1979 stood superseded by Will dated 2.4.1986, whereby Shanti bequeathed her entire estate in his favour. Several preliminary objections were also raised.

5. Trial Court framed various issues and at the end of the trial concluded that Will dated 2.4.1986 set up by defendant No.1 was a validly and lawfully executed Will and on the strength of that Will defendant No.1 had succeeded to the entire estate of deceased Shanti. Consequently, the suit was dismissed. Appellant-plaintiff went in appeal to the Court of District Judge, who has affirmed the findings of the trial Court and dismissed the appeal.

6. Contention of the learned counsel for the appellant-plaintiff is that the two Courts below have not appreciated the evidence in the right perspective. He drew my attention to the statement of DW-3 K.S. Patial, who stated that though he was one of the attesting witnesses to the Will and had identified the testatrix before the Sub Registrar at the time of the registration of the Will, yet he did not personally know Shanti and that it was only Bhagirath, the other attesting witness, and the wife of said Bhagirath, who told him that the name of testatrix was Shanti and that she was a distant

counsin of his (witness's) father-in-law (*dadi saas*). The other witness Bhagirath could not be examined, as he had died before the trial commenced.

7. It is true that the testimony of DW-3 creates some doubt whether the lady, who executed the Will and presented it for registration to the Sub Registrar, was the testatrix herself, but this is not the only evidence that has come on record. Defendant Jagdish Ram himself stated in no uncertain terms that though he was not present at the time of the execution of the Will, yet 5-6 days after the execution of the Will the testatrix had informed him that she had executed a Will in his favour. This part of the testimony of the defendant was not subjected to cross-examination and, therefore, there is no reason for disbelieving the same. The effect of the aforesaid unchallenged testimony of this witness is that the testatrix herself having told him that she had made a Will in his favour, the genuineness of the will cannot be doubted. Furthermore, the Will upon which the plaintiff-appellant has placed reliance was executed in the year 1962, which stood superseded by Will dated 28.11.1979, which the testatrix executed in favour Nathu, father of respondent No.1, who is respondent No.2. Plaintiff suggested to defendant Jagdish Ram, when he was in the witness box as DW-1, that Smt. Shanti had executed a Will on 28.11.1979 in favour of his (Jagdish's) father. That means the appellant-plaintiff admitted the execution of the Will in the year 1979 by the testatrix, meaning thereby that the Will of 1962, on which the claim of the plaintiff is based, was superseded and if that is so he cannot claim title to the

suit property on the basis of the superseded Will of 1962. So, the contention raised by the learned counsel for the appellant is rejected.

8. No other point has been urged.

9. As no substantial question of law arises, appeal is dismissed.

CMP No.793/2006

Infructuous.

November 15, 2006(sd) **(Surjit Singh), J.**